No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTRODUCTION

Congress enacted the federal officer removal statute to ensure that federal officers (and later agencies) would have a means of removing to federal court cases brought against them in state court. The primary purpose was to provide a federal forum for immunity defenses that federal officers and those "acting under" them could assert. As this Court's cases establish, persons "acting under" such officers or agencies are persons who aid or assist in the performance of official functions. Under any reasonable view, Philip Morris in its marketing and sale of cigarettes is considerably far afield of the type of actor Congress intended the statute to protect.

In its brief, Philip Morris largely abandons the comprehensive-control theory that it has advanced in numerous cases in the lower courts and that it led the Eighth Circuit below erroneously to embrace. That theory, which opened up the statute to removals by scores of companies regulated far more heavily than tobacco companies, finds no support in this Court's cases construing the federal officer removal statute. Instead, Philip Morris now argues that cigarette makers are unique not because of the degree of governmental control over their operations, but because of what they assert to be the historical happenstance that the FTC for a time tested the tar and nicotine content of cigarettes and then stopped doing so, imposing instead a reporting requirement on cigarette makers. That newfound theory, however, is no more persuasive than Philip Morris's previous arguments to obtain § 1442(a)(1)'s benefits. It rests on mischaracterizations of the complaint, the procedural effect to be given to its removal notice, the facts underlying the FTC's decision to stop testing cigarettes for tar and nicotine, and the regulatory consequences of the FTC's actions. Philip Morris's new theory therefore should be rejected just as decisively as its former theory has now essentially been discarded.

ARGUMENT

I. PHILIP MORRIS'S "DELEGATED AUTHORITY" THEORY IS WITHOUT MERIT

Largely forsaking its defense of the Eighth Circuit's comprehensive-control test, Philip Morris asserts (at 26-32) that it is "acting under" a federal officer for purposes of 28 U.S.C. § 1442(a)(1) because, in testing the tar and nicotine yields of its cigarettes, it exercises authority "delegated" to it by the FTC. This theory — which reflects a sea change in Philip Morris's position[1] — rests on two flawed premises: first, that petitioners' state-law claims challenge Philip Morris's cigarette-testing program; and, second, that Philip Morris conducts the testing program on behalf of, and by delegation of authority from, the FTC.

A. Petitioners' Claims Do Not Challenge The Cambridge Filter Method

Philip Morris concedes (at 42) that it is not "acting under" the FTC in marketing and selling its light cigarettes in compliance with FTC regulation. That concession should be dispositive here, because the claims that it purported to remove relate solely to its marketing and sale of light cigarettes.[2]

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[1] Until it filed its brief on the merits in this Court, Philip Morris consistently argued simply that federal officer removal is proper whenever "a defendant [is] sued for actions that were subject to the direction, control, and supervision of federal officials." PM Br. in Opp. 10. It accordingly offered no counterstatement of the Question Presented [illegible]th in the petition for a writ of certiorari. In its brief on the mer[illegible] however, Philip Morris attempts for the first time to reformulate the Question Presented to fit its new "delegation" theory. *See* PM Br. i. Having accepted petitioners' formulation at the certiorari stage, Philip Morris is not free to recast the issue before this Court to accommodate its newly developed theory of the case: "Under this Court's Rule 15.2, a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (internal quotation marks omitted).

[2] Philip Morris itself repeatedly acknowledged below that petitioners' claims were focused on its marketing practices. *See, e.g.*, PM C.A.

In accordance with its new theory of the case, however, Philip Morris now insists that "[p]etitioners' complaint is, at its core, a direct attack upon the official tar and nicotine testing program that the FTC delegated to" Philip Morris. PM Br. 22. But Philip Morris cannot manufacture a right of removal simply by recharacterizing petitioners' claims to suit its new legal theory.

The essence of petitioners' claims is that Philip Morris intentionally designed its "light" cigarettes — by, among other things, "modification of tobacco blend, weight, rod length, and circumference," "use of reconstituted tobacco sheets and/or expanded tobacco," and "increase of smoke pH levels by chemical processing and additives" — to increase the nicotine and tar levels delivered to smokers, while at the same time fraudulently marketing those cigarettes as delivering less tar and nicotine than regular cigarettes when actually smoked by consumers. Pet. App. 64a-65a (Am. Compl. ¶ 12(a), (c)); *id.* at 65a (Am. Compl. ¶ 13). That Philip Morris's fraudulent scheme involved, in part, knowingly designing its cigarettes to trick a feature of the FTC's regulatory regime — the Cambridge Filter Method — and then reporting those results (which Philip Morris knew to be misleading) in marketing its light cigarettes does not mean petitioners' claims are "ultimately" a challenge to that regime. PM Br. 1.[3]

Br. 2 (plaintiffs' complaint "challeng[es] PM USA's *marketing* of 'light' cigarettes") (emphasis added); *id.* at 34 ("Plaintiffs' complaint challenges PM USA's *marketing* pursuant to the FTC's policies and directives.") (emphasis added); *id.* at 35 ("the very conduct at issue" in this case is the "alleged deceptive *marketing* of Lights") (emphasis added).

[3] *See, e.g., United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) ("The specific advertisements which the Government claims were intentionally misleading . . . were certainly not mandated by the FTC."); *Paldrmic v. Altria Corporate Servs., Inc.*, 327 F. Supp. 2d 959, 966-67 (E.D. Wis. 2004) (design and manufacture of Marlboro Lights were "acts that most assuredly were not performed under the direct and detailed control of the FTC"); *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 846 (N.D. W. Va. 2004) ("[T]he FTC . . . did not direct [Philip Morris] to 'trick' the testing procedure, and did not require [Philip Morris] to disseminate misleading information.").

Philip Morris cannot evade that conclusion by contending (at 21-22) that the Court must "credit" the company's "theory of the case." Though the removing defendant is entitled to craft its own colorable argument for federal removal, the plaintiff remains "master of [its own] claim," and the defendant is not free to recast the complaint to suit its removal theory. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 394 (1987) (rejecting defendant's claim that plaintiffs' "state-law contract claims [were] *in reality* completely preempted" federal-law claims) (emphasis added). Were it otherwise, any federally regulated entity with a plausible preemption defense could remove to federal court simply by *asserting* that the "core" of the plaintiff's case is a challenge to a federal regulatory regime.[4]

In all events, Philip Morris's attempt to recast petitioners' state-law claims as a challenge to the Cambridge Filter Method is ultimately beside the point. Even if this case were "about" nothing more than the Cambridge Filter Method, Philip Morris would have no right to removal under § 1442(a)(1). In Philip Morris's view of the case, it

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[4] Contrary to Philip Morris's assertion, nothing in *Jefferson County v. Acker*, 527 U.S. 423 (1999), requires this Court to credit Philip Morris's revisionist reading of petitioners' claims. At issue in *Acker* was whether two federal judges could remove to federal court a state-court suit for the collection of a county license tax imposed, in the judges' view, on the performance of their federal judicial duties and therefore in violation of the intergovernmental tax immunity doctrine. Unlike Philip Morris, the judges in *Acker* were self-evidently within the class of federal judicial officers entitled to removal under 28 U.S.C. § 1442(a)(3). *See id.* at 432. The question was whether there was a causal connection between the tax-collection suit and the judges' official action sufficient to establish that the suit was "for any act under color of office" within the meaning of § 1442(a)(3). Because that issue necessarily merged with the merits of the judges' defense, and because all that is required of federal officers for purposes of removal is a "colorable defense," not "an airtight case on the merits," the Court accepted the judges' "theory of the case" on the merits for purposes of its jurisdictional inquiry. *Id.* The alternative would have required the Court "to decide the merits of this case" in order to resolve the removal issue. *Id.* There is no similar reason here to credit Philip Morris's recharacterization of petitioners' claims.

was compelled by regulatory edict to use the Cambridge Filter Method as part of a comprehensive regime governing the marketing and sale of cigarettes. *See* PM Br. 1-10. *But see infra* pp. 18-19. Even if its theory is presumed to be true at this stage in the litigation, that theory merely sets up a preemption defense that its compliance with the strictures of the federal regime precludes state-law claims based on that compliance. *See, e.g., Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392-93 (5th Cir. 2007). But this Court's cases make clear that a preemption defense is not a basis for removal. *See Caterpillar*, 482 U.S. at 393; *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988).

Finally, Philip Morris's claim (at 2, 12, 22) that this Court must accept as true the factual averments in its removal petition is of no practical consequence. Petitioners here challenge not the facts on which Philip Morris relies but the legal conclusions it seeks to draw from those facts. *See* Pet. Br. 44-48. No principle of law requires this Court to accept for purposes of removal the legal conclusions or assumptions embodied in a defendant's removal petition.

B. Compliance With FTC Regulation Is Not An Exercise Of "Delegated Authority"

The federal officer removal statute protects federal officers and agencies in *their enforcement* of the law and official functions. It does not afford a removal right to *regulated entities complying* with federal law. *See* Pet. Br. 23-27. Philip Morris's contrary approach turns the statute's purposes upside down, by giving a right of removal to private commercial actors (like Philip Morris) that are the *objects* of, rather than *participants* in, federal law enforcement. *See id.* at 23-24. Distinguishing between compliance with and enforcement of federal regulation is necessary to avoid a bizarre interpretation of the "acting under" clause that would "convert opponents into virtual agents." *Brentwood Academy v. Tennessee Secondary Sch.*

Athletic Ass'n, 531 U.S. 288, 303-04 (2001); *see* Pet. Br. 24-25.

Philip Morris does not confront these concerns head-on. Instead, it tries to clothe itself in the mantle of law enforcement by depicting its cigarette-testing obligation as a "delegation" of authority from the FTC. Philip Morris's theory is that it conducts testing activities as an agent of the federal government and is therefore entitled to the protections of federal officer removal when it is sued in state court for acts committed in its agency capacity. The suit in this case, of course, challenges Philip Morris's marketing and sale of light cigarettes, not its testing of those cigarettes. But, even if Philip Morris could permissibly recast petitioners' claims as attacks on the cigarette-testing regime, its characterization of its role in that regime as a delegated federal law-enforcement officer, as opposed to simply an object of federal regulation, is both implausible and baseless.

1. *Philip Morris's own factual averments do not establish "delegation" of authority by the FTC.* Crediting Philip Morris's averments in full, the facts are that, in the 1980s, the FTC restructured its regulation of the tobacco industry by compelling tobacco companies, rather than the FTC, to bear the costs of cigarette testing. That restructuring concerned the 1970 voluntary agreement, which, in Philip Morris's view, was the pillar of the FTC's regulation of light cigarettes. *See* PM Br. 8 (arguing that "the FTC has strictly policed [the terms of the 1970 agreement]" to ensure compliance). Specifically, in the 1980s, the 1970 pact was amended to require tobacco-company testing, to allow the FTC access to industry testing facilities, and to "obligat[e]" tobacco companies to use "the 'tar' and nicotine ratings" generated by such testing in the companies' "cigarette advertising." PM C.A. App. 654-57; *see* PM Br. 30 ("the FTC ordered the industry to instead perform the testing (under the FTC's control)"). Despite that shift in FTC policy — from conducting tests itself to requiring the industry to conduct the tests — the testing

requirement (as a condition for marketing and selling light cigarettes and assuming for the sake of argument that there was such a requirement) remained fundamentally an incident of federal regulation.[5]

This case — on Philip Morris's own theory — therefore bears all the hallmarks of an agency imposing regulatory requirements on a regulated entity. Despite more than 20 references to "delegation" and "delegated authority" in its brief, Philip Morris points to no document, rule, policy statement, regulation, or any other *evidence* demonstrating that the FTC in fact delegated (or intended to delegate) its statutory authority to the tobacco industry. In fact, nothing in the public record suggests that the FTC ever contemplated any such delegation of authority. To support its bald assertion, Philip Morris points only to a simple sequence of events: first the agency did the testing of cigarettes; then the agency halted its own testing activities and required the industry to perform the testing. From that bare chronology Philip Morris infers that the FTC necessarily "delegated" its testing authority to the industry. The inference is unwarranted. Philip Morris's "delegation" theory is "entirely a creature of [its] own invention." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785-86 (1991) (rejecting the "strange notion" that 28 U.S.C. § 1362 represents a "delegation" to Indian tribes of federal exemption from state sovereign immunity where nothing in the statute or case law "mention[ed] [the] word" "'delegation'").

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[5] Evidence submitted by Philip Morris, for example, makes clear that the FTC thought it was doing nothing unusual in closing its laboratory and relying on regulation to compel the industry to conduct the testing. William C. MacLeod, then-director of the Bureau of Consumer Protection, responded to congressional concern that the FTC had elected to rely on tobacco companies to test by pointing out that "[i]t is *generally the case* in the regulation of measurements of performance and constituent standards that the Government leaves it to the industry with appropriate checks and balances upon the performance that the industry reports." JA 99 (emphasis added).

The facts alleged by Philip Morris evince none of the ordinary indicia of delegation. Delegation is "[t]he act of entrusting another with *authority* or empowering another to act as an *agent* or representative." *Black's Law Dictionary* 459 (8th ed. 2004) (emphases added). That standard is not remotely met here.

To begin with, Philip Morris did not need the FTC's authorization to test its own products. Indeed, the cigarette companies had long been conducting tar and nicotine testing themselves without any official authorization. *See* PM C.A. App. 689 (during the operation of the FTC laboratory, TITL was testing as well). The tobacco companies' untrustworthiness in performing their own testing and reporting of accurate results had led the FTC to begin its testing program in 1967.[6] That private, commercial testing — which predated the FTC program — was done to advance the tobacco companies' profits, not to promote the FTC's regulatory agenda or the public interest.

Moreover, Philip Morris was not "exercising power possessed by virtue of . . . law" or "clothed with the authority of . . . law" in testing its own cigarettes and providing the FTC with the results. *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (internal quotation marks omitted). The FTC certainly took no formal or informal action expressly endowing the industry with the agency's authority or responsibility. Nor did it empower Philip Morris to act as its agent in testing cigarettes in compliance with

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[6] When it announced the ending of its testing program as a cost-saving measure, the FTC explained in congressional testimony that it viewed market forces (tobacco companies reporting their rivals' dishonest test results), random checks by FTC inspectors of the TITL laboratory, and occasional alternative tests on cigarettes at a different government laboratory to be suitable checks on the cigarette-testing process to ensure accuracy in the reporting of tar and nicotine levels. *See* JA 100-03. The FTC thus sought to obtain the same regulatory effects — true and accurate information about tar and nicotine content — through a different use of government resources. That change in regulatory strategy, however, in no way constituted a "delegation" of authority.

federal regulation. On the contrary, as a regulated commercial actor with interests "characteristically" antagonistic to those of the regulatory agency, *id.* at 318-19, Philip Morris was an "opponent," not a "virtual agent," of the FTC. *Brentwood Academy*, 531 U.S. at 303-04.[7]

2. *Philip Morris's alternative theory of being a "contractor" with the FTC has no merit.* In an alternate formulation, Philip Morris says (at 31) that the FTC "contracted out its testing obligations" to the tobacco companies. But Philip Morris has pointed to no actual contract, and there is none. The FTC never solicited bids for conducting cigarette testing on its behalf, never awarded any contract to perform such testing, and never compensated the tobacco companies for conducting the tests. Yet these are precisely the steps a government agency would be expected to take if it wished to "contract out" a service. *See* 48 C.F.R. Pt. 1 (Federal Acquisition Regulations). Instead, the FTC, exercising its regulatory authority under the FTC Act, compelled tobacco companies to test their products and to disclose those results to the Commission. *See* PM Br. 14 (citing court of appeals' holding that FTC "requires the cigarette manufacturers to conduct the testing"); *see also* 15 U.S.C. § 46(a) (authorizing FTC "[t]o gather and compile information" from regulated entities); *id.* § 46(b) (authorizing FTC to require regulated entities "to file with the Commission . . . annual or special . . . reports"). Even on Philip Morris's testing theory, this case is about an

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[7] It is doubtful that the FTC could lawfully have "delegated authority to test cigarettes" to tobacco companies, as Philip Morris insists it did (at 31). An agency ordinarily may not, absent express congressional authorization, delegate official tasks to outside parties. *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004); *Shook v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 783-84 & n.6 (D.C. Cir. 1998). Philip Morris points to no congressional statute expressly authorizing such a delegation.

agency's exercise of regulatory authority, not a contracting out of services.[8]

3. *Philip Morris's delegation theory finds no support in this Court's cases.* Philip Morris's novel theory of delegation by regulation is foreign to the federal officer removal statute. A clear difference exists between the soldier in *Davis v. South Carolina*, 107 U.S. 597 (1883), and the chauffeur in *Maryland v. Soper*, 270 U.S. 9 (1926), on the one hand, and Philip Morris on the other: the soldier and chauffeur were actively participating in *enforcing* the federal revenue laws, whereas Philip Morris, in conducting its testing activities, is *complying* with regulatory requirements as an *object* of federal regulation. Nothing in the text, history, or purposes of the federal officer removal statute suggests that it was meant to benefit those who merely comply with, as opposed to those who assist in enforcing, federal regulation.

Courts long ago rejected the concept that private actors could remove on the theory that, in complying with federal regulation, they were assisting federal officers. *See Johnson v. Wells, Fargo & Co.*, 98 F. 3, 7-8 (C.C.N.D. Cal.

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[8] The FTC is hardly alone in requiring regulated entities to perform testing. For example, "[b]oth FIFRA and TSCA . . . permit EPA to require the manufacturer or processor of an existing chemical to undertake testing at its own expense covering the entire range of information relevant to [an] unreasonable risk determination." John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 Colum. L. Rev. 261, 312 (1991). The TSCA testing provisions were adopted to avoid burdening the government with the costs of testing. *See* 15 U.S.C. § 2601(b)(1). Private testing, moreover, supplements the EPA's own research and testing of chemicals, undertaken "to avoid the bias that can affect privately produced data." Applegate, 91 Colum. L. Rev. at 306; *see also* Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm*, 89 Geo. L.J. 257, 265 (2001) (noting that, in addition to authority to require manufactures to test new chemicals, "EPA itself screens" chemicals each year). Regulatory regimes that combine public and private testing obligations are not unique to the EPA. *See* Public Citizen Br. 20-22 (discussing FDA, USDA, and NHTSA testing).

1899) (No. 12739) (a regulated common carrier, though subject to federal tariff regulations, was not "acting under" a federal revenue officer when it refused, under the authority of those regulations, to transport a tendered package that lacked a required revenue stamp). Likewise, Philip Morris does not assist in *enforcing* the FTC Act when it merely *complies* with what Philip Morris claims to be FTC-imposed testing obligations; rather, it is a regulated party that, like the carrier in *Wells Fargo*, is simply "brought within the range" of a federal regulatory regime. *Id.*

Philip Morris maintains that, "[a]s an historical matter, PMUSA's delegated responsibility for testing . . . is no different from a private individual's delegated responsibility to examine imported goods to determine whether they had been shipped from England in violation of the Customs Act of 1815." PM Br. 30. But that claim fails to account for the essential difference between regulated entities (which comply with federal law) and federal officers and their agents (who enforce federal law). Under Philip Morris's rendition of the statute, shippers obliged to comply with the Custom Act of 1815 would as a class have been entitled to removal. Yet that notion has no basis in the historical purpose of the statute, which was to safeguard those charged with *enforcing* unpopular federal laws *against* regulated entities from harassing suits brought *by* those regulated entities. *See* Pet. Br. 17-18. Philip Morris cites no evidence that Congress intended to extend a benefit of removal to the regulated entities themselves.

Nor does such a view make historical sense: the animus directed at those enforcing federal law would not logically be directed at regulated entities complying with federal regulation. *See id.* at 18. Indeed, it is telling that Philip Morris makes no serious effort to explain how regional animus against enforcement of the FTC Act could be

directed against it, such that it needs the protection of a federal forum.[9]

4. *Philip Morris's novel limiting principle is self-serving and wrong.* Recognizing the breadth of the Eighth Circuit's comprehensive-control test, Philip Morris proposes a limitation that, it posits, only tobacco companies can meet: its delegated-authority theory applies, Philip Morris says, only because "the government itself *previously* performed . . . the testing." PM Br. 43 (emphasis added). Regardless of whether such a limitation would restrict removal by regulated entities in other industries, the historical sequence of testing activities does not transform this case from one of regulatory compliance into one of delegated authority.[10] The essential relationship between Philip Morris and the FTC remains that of regulating agency and regulated entity — a relationship that is manifestly insufficient to support federal officer removal. *See supra* pp. 10-11.

Beyond those problems, Philip Morris's proposed standard would lead to absurd results. It would mean, for example, that, if the FTC had opened its laboratory *after* it had imposed a testing requirement on tobacco companies, Philip Morris would lack a basis for removal, even though the relevant conduct — Philip Morris's testing, marketing, and sale of light cigarettes — would have been the *same* regardless of the timeline. It would also mean that a federal agency with a history of public testing — such as

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[9] Philip Morris properly concedes (at 46) that it cannot claim the protections of official immunity. Because a core purpose of the federal officer removal statute is to afford a federal forum for resolution of immunity defenses, *see Willingham v. Morgan*, 395 U.S. 402, 407 (1969); *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 86-87 (1991), Philip Morris's conceded inability to invoke that defense reinforces the conclusion that it is not within the class entitled to removal.

[10] Philip Morris's historical characterization is also wrong: tobacco companies did not start testing *after* the FTC closed its laboratory; they had been doing their own testing all along. *See* PM C.A. App. 689.

the EPA — would extend a right of federal officer removal to any entity on which it subsequently imposed testing requirements.

In addition, making dispositive the fact that the FTC itself tested cigarettes would result in the perverse outcome that an industry uniquely *distrusted* by a federal agency would have a claim to federal officer removal precisely because of that distrust. The FTC opened its own laboratory because it considered it "highly undesirable to allow cigarette manufacturers to use tar and nicotine data in advertising obtained from the manufacturers' own laboratories." JA 153-54; *see also Strengthening the Cigarette Labeling Act*, 112 Cong. Rec. 17270, 17274 (1966) (quoting letter from FTC chairman expressing concern "that the manufacturers will publish misleading figures" and recommending that "products be tested by a central laboratory"). The FTC concluded "that the past record of cigarette manufacturers in matters related to false and misleading advertising makes reliance on their good faith alone . . . highly inadvisable." JA 156. Because the FTC tested cigarettes out of a distrust of tobacco companies before imposing the testing obligation on the regulated entities themselves, Philip Morris views itself as entitled to a statutory benefit not available to *any other* regulated industry. *See* PM Br. 43. This Court should reject an interpretation of the statute that produces such a bizarre outcome. *Cf. Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454 (1989) (rejecting reading of statute that would "compel an odd result") (internal quotation marks omitted).

II. PHILIP MORRIS'S DEFENSE OF THE EIGHTH CIRCUIT'S TEST IS UNAVAILING

The federal officer removal statute protects private parties only when they are sued for acts committed while aiding or assisting federal officers in the performance of their official duties. *See City of Greenwood v. Peacock*, 384 U.S. 808 (1966); *Maryland v. Soper*, *supra*; *Davis v. South Carolina*, *supra*. Contrary to the Eighth Circuit's

approach, the statute does not extend a right of removal to private commercial actors on the basis of their compliance with "comprehensive and detailed" federal regulation.

Philip Morris offers only a half-hearted defense (at 33-36) of the Eighth Circuit's comprehensive-control test. *First*, Philip Morris claims that this Court has never defined the "outer bounds" of the "acting under" clause: "Although the Court's precedents indicate that aiding or assisting a federal officer is *sufficient* to satisfy the 'acting under' standard, they do not establish that the provision of aid or assistance is *necessary* to meet that requirement." *Id.* at 33. But Philip Morris overlooks *Peacock*, in which this Court held that removal under 28 U.S.C. § 1443(2) is limited to instances in which a private actor is "authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law." 384 U.S. at 824; *see* Pet. Br. 22-23; U.S. Br. 11-16. The Court's analysis in *Peacock* applies with added force to § 1442(a)(1). If the civil-rights removal statute's *implicit* "acting under" clause restricts private-party removal to those who aid or assist a federal officer, the federal officer removal statute's *explicit* "acting under" clause surely embodies the same restriction. That conclusion is reinforced by the *Peacock* Court's reliance on the history of the federal officer removal statute, in which it found ample support for an "aiding or assisting" restriction on removal by private parties. *See* 384 U.S. at 820 n.17.

Second, Philip Morris asserts, relying on a snippet of language drawn out of context from *Tennessee v. Davis*, 100 U.S. 257 (1880), that removal is proper whenever "a private party acts at the direction of a federal officer." PM Br. 33-34. In *Tennessee v. Davis*, this Court upheld the constitutionality of the removal statute as applied to a federal officer engaged in the discharge of his law-enforcement duties as a deputy collector of internal revenue. *See* 100 U.S. at 260-63; *id.* at 263 (discussing interest in protecting federal "officers and agents"). Philip

Morris claims that the decision points to a ground for removal in *any* case in which a *private party* claims to have acted "under the immediate direction of the national government, and in obedience to its laws." PM Br. 33 (internal quotation marks and emphases omitted). That assertion grossly misapprehends this Court's holding and ascribes a historically inaccurate purpose to the statute. It confuses the role of federal officer removal — which is limited to federal officers and those assisting them in enforcing federal law — and the defense of preemption — which is more broadly available to private regulated parties based on compliance with federal directives. *See* Pet. Br. 17-18, 30-31.

Third, Philip Morris tries to put a more favorable spin (at 34) on the definitions of "acting under" cited by petitioners and the United States. But those definitions confirm what is clear from the adjoining "color of . . . office" clause and the lineage of the statute — namely, that a private party acts *under* a federal officer in assisting the officer as subordinate in performing official duties. *See, e.g.*, *Black's Law Dictionary* 1695 (4th ed. 1968) ("under" is "[s]ometimes used in its literal sense of below in position, beneath, but more frequently in its secondary meaning of 'inferior' or 'subordinate'"). A contrary reading of "under," which would significantly expand federal jurisdiction by affording a right of removal to private entities merely because they are subject to federal regulation, is inconsistent with settled canons of interpretation. *See* Pet. Br. 27 & n.9; *see also Gonzalez v. Oregon*, 126 S. Ct. 904, 925 (2006) ("[B]ackground principles of our federal system . . . belie the notion that Congress would use . . . an obscure grant of authority to regulate areas traditionally supervised by the States' police power.").

Fourth, Philip Morris seeks support for a comprehensive-control test in the legislative history of the 1996 amendment to § 1442(a)(1): a reference to "preemption" in a House report, says Philip Morris (at 36), is "clear indication that Section 1442(a)(1) extends to private persons

subject to federal regulation." The text of that House report, however, makes clear that Congress's concern was with the removal right of federal agencies, not private regulated commercial actors: "The result of these decisions has been that *federal agencies* have had to defend themselves in state court, despite important and complex federal issues such as preemption and sovereign immunity." H.R. Rep. No. 104-798, at 20 (1996) (emphasis added). The notion that Congress must have been referring to private actors because federal agencies do not invoke preemption defenses is wrong: first, the quoted sentence specifically refers to "federal agencies," not to private parties; second, the idea that a federal officer or agency would invoke the supremacy of federal law as a defense against application of state law is hardly novel.[11]

Fifth, Philip Morris analogizes (at 38) to cases involving government contractors. But the fact that some courts have allowed government contractors to remove under § 1442(a)(1) says nothing about whether a private actor that lacks a contractual relationship with the government and is merely an object of federal regulation may do the same. Those courts have reasoned that a government contractor may be deemed a *de facto* federal *employee* in certain circumstances and may have a ground for removal when sued for acts performed in that role and under the government's control and supervision. *See* Pet. Br. 32-33.[12] That analysis, if sound, might in some

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[11] *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426-28 (1819); Laurence H. Tribe, *American Constitutional Law* § 6-30, at 511 (2d ed. 1988) ("state attempts to regulate or tax entities with some special link to the federal government" raise issues of "federal preemption").

[12] Philip Morris indefensibly imputes to petitioners, by means of a cropped quotation, a view that petitioners plainly were ascribing to those courts that have allowed removal by government contractors. Philip Morris says the following, quoting from our opening brief: "According to petitioners, removal is appropriate where 'federal control and oversight . . . is substantial and the tasks being performed are those that the government might otherwise perform itself.'" PM Br. 26. This is what the sentence actually said (with the omitted portion

circumstances be reconciled with the text, history, and purposes of the statute. *See id.* at 33; *see also* H.R. Rep. No. 80-308, at A134 (1947). But Philip Morris cannot sensibly be thought of as a *de facto* employee of the federal government based on its compliance with regulatory obligations. Philip Morris is not on the government's payroll, is not exercising governmental authority, and can point to no contract from which a government-contractor defense might arise. Rather, Philip Morris is doing no more than complying with regulatory duties for the purpose of participating in commercial activity — namely, the marketing and selling of light cigarettes. The government-contractor cases therefore offer no support for Philip Morris's removal theory.

III. PHILIP MORRIS IS NOT SUBJECT TO COMPREHENSIVE AND DETAILED CONTROL

Petitioners and their *amici* have shown that Philip Morris is not entitled to removal even under a comprehensive-and-detailed-control test. *See* Pet. Br. 39-48; U.S. Br. 2-5, 20-21; Public Citizen Br. 17-20; Campaign for Tobacco-Free Kids Br. 20-25.

At the threshold, Philip Morris responds that "petitioners . . . disregard the averments in PMUSA's Notice of Removal, which . . . are controlling for purposes of this Court's jurisdictional analysis." PM Br. 38. But petitioners do not quarrel here with the *facts* — *e.g.*, whether the FTC adopted a consent order with American Brands in 1971. They dispute only the *legal* conclusions that Philip Morris seeks to draw from those facts — *e.g.*, whether a

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italicized): "*Those [government-contractor] decisions rest on the view that a government contractor may be deemed an employee of the federal government when* federal control and oversight of the contractor is substantial and the tasks being performed are those that the government might otherwise perform itself." Pet. Br. 32-33. To be clear, petitioners acknowledge but do not here endorse the lower court decisions permitting federal officer removal by government contractors. Nor need this Court reach the question in this case, because Philip Morris cannot legitimately claim the status of a government contractor.

consent order has the effect of regulating on an industry-wide basis. This Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

Three points establish that the FTC's regulation of light cigarettes is anything but comprehensive. *First*, Philip Morris does not dispute that, although the FTC has broad authority to adopt trade regulation rules, it has never promulgated a single rule governing cigarettes. *See* 16 C.F.R. Pt. 408; Pet. Br. 39-40. And, as *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985), established, the FTC was not even authorized to require the Cambridge Filter Method. At best, Philip Morris has shown that the FTC adopted an informal policy of not pursuing enforcement actions against companies that make tar and nicotine disclosures. If *that* is the standard for "comprehensive" regulation, then it is hard to imagine a federally regulated entity that would *not* be entitled to remove under the federal officer removal statute. *See* Pet. Br. 34-36.

In response, Philip Morris takes issue (at 39 n.11) with petitioners' reading of *Brown & Williamson*. But the D.C. Circuit was clear that it did not want to "enshrine the current FTC system as the sole legitimate testing method" because "it was not passed [as a trade regulation rule] pursuant to section 18 of the FTC Act." 778 F.2d at 45. And Philip Morris's record evidence is to the same effect: "In the litigation that arose from the Barclay cigarette issue of a few years ago . . . [t]he answer that the courts gave was [the FTC] cannot force a company to use nor can [the FTC] approve in advance the kind of testing a company uses." PM C.A. App. 329.

Second, the FTC itself has determined that there are no regulatory definitions of "light" and "low tar," thereby undermining important parts of respondents' claims. *See* Notice, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. 48,158, 48,163 (1997); Pet. Br. 40-41. Philip Morris makes no attempt to reconcile its position here

that it is comprehensively regulated in its use of "light" descriptors with the position it took in 1998 that there was no need even for "official" regulatory "guidance" as to those same descriptors. Comments of Philip Morris Inc., *et al.*, at 94, *On the Proposal Entitled FTC Cigarette Testing Methodology*, FTC File No. P944509 (filed Feb. 5, 1998).

Third, as demonstrated in our opening brief, the FTC's consent orders with parties *other* than Philip Morris are not signs of comprehensive industry-wide regulation. *See* Pet. Br. 44-48. In response, Philip Morris insists (at 41) that "courts have repeatedly recognized that FTC consent orders have regulatory effects that extend well beyond the parties to the agreement." None of its cited cases, however, supports the claim that consent orders serve as industry-wide regulation. Settled precedent establishes, to the contrary, that FTC consent orders are *not* a vehicle for establishing industry-wide policy. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 330 n.12 (1961) ("the circumstances surrounding such negotiated [consent] agreements are so different that they cannot be persuasively cited in a litigation context"); *Trans Union Corp. v. FTC*, 245 F.3d 809, 816-17 (affirming FTC decision that previous consent order had no "precedential effect" on subsequent order and did not entitle regulated party to the same negotiated bargain), *on denial of reh'g*, 267 F.3d 1138 (D.C. Cir. 2001); *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 312 (7th Cir. 1976) (previous consent order does not establish "controlling precedent for later Commission action").[13]

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[13] *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 391 (1959), does not, as Philip Morris's *amici* contend, point to a different result. *See* Former FTC Staff Br. 24. The Court there found support for its interpretation of the Fur Products Labeling Act in the FTC's "consistent administrative construction" of the Act, exemplified by *In re Ed Hamilton Furs, Inc.*, 51 F.T.C. 186 (1954), and reinforced by more than a hundred subsequent cease-and-desist orders based on that case. 359 U.S. at 391 & n.6. Although styled a "Stipulation for Consent Order," the order ending the *Ed Hamilton Furs* proceeding was itself, in substance,

Philip Morris also quotes (at 41-42) the congressional testimony of a former FTC chairman explaining that the agency may choose to proceed by adjudication rather than by rulemaking because adjudication is often more efficient. But no one disputes that adjudicatory orders may have precedential effect in prescribing permissible conduct by regulated parties. The question is whether FTC *consent* orders, which cut short the adjudicatory process and which consequently embody no findings of fact or generally applicable conclusions of law, can nevertheless serve as the foundation of the agency's comprehensive regulation of an industry. Nothing in the testimony or any case on which Philip Morris relies supports the conclusion erroneously reached by the Eighth Circuit (Pet. App. 15a) that consent orders can have any such effect.

Finally, Philip Morris points (at 40) to a 1967 FTC policy statement purportedly authorizing the tobacco industry to make representations about the tar and nicotine content of cigarettes if substantiated by proper testing. But Philip Morris cites no authority for its premise that a policy statement has the force of a trade regulation (it does not, *see* Campaign for Tobacco-Free Kids Br. 7 n.2), let alone that it may form the basis for a comprehensive regulatory regime.

CONCLUSION

The judgment of the court of appeals should be reversed.

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a cease-and-desist order. The defendant stipulated to the record, withdrew its answer to the FTC's complaint, and, most importantly, "agree[d] that the order . . . shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon." 51 F.T.C. at 193-94. That language does not appear in the 1971 and 1995 consent orders on which Philip Morris here relies.

Respectfully submitted,

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